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Supreme Court of Vermont.

WILEY v. FIRST NATIONAL BANK OF BRATTLEBORO.

National Banks, created under the Act of Congress, have no power to bind themselves or the corporators, by accepting bonds, coin, or other valuable things, upon special deposit, for safe keeping and return on demand, and no recovery can be had against the bank for any such deposit left with the cashier and not returned on request.

THIS was an action on the case in three counts, with a count in trover, for certain United States bonds.

The plaintiff's evidence tended to show that in January 1869, at the defendant's banking-house in Brattleboro, he delivered to S. M. Waite, who then was, and ever since has been, the cashier of said bank, \$2400 worth of United States 5-20 bonds, and the plaintiff offered in evidence, and it was admitted under defendant's objection, a written receipt in the words and figures following, to wit:—

“THE FIRST NATIONAL BANK OF BRATTLEBORO.

Brattleboro, Vt., Jan. 8, 1869.

Lucius L. Wiley has deposited in this bank twenty-four hundred dollars of 5-20s, 1867, for safe keeping, as a special deposit.

July 1, 1869.
Jan. 1, 1870.
July 1, 1870.
Jan. 1, 1871.

S. M. WAITE, C.”

The words “The First National Bank of Brattleboro,” were a printed heading to the paper on which said receipt was written.

The plaintiff's evidence tended to show that at the several dates minuted on the margin of said paper, he called at said bank, and said Waite paid him the interest on said bonds, and entered said memoranda on the margin of the paper, that in August 1871, he presented said receipt to said Waite at said bank, and demanded said bonds of him; that said Waite replied that he wished he had them, but they were gone, and did not then nor has he since delivered said bonds to the plaintiff; that some time before said demand was made, said Waite informed him that said bonds had been stolen the June before.

The plaintiff conceded that the defendant was a National Bank, duly organized under the Act of Congress of June 1864, known as the “National Currency Act,” and upon the above evidence rested his case.

The defendant gave no evidence tending to show that said bonds had in fact been stolen, nor did the evidence show, save as above stated, any reason for not delivering said bonds when demanded as aforesaid.

The defendant offered no evidence, and declined to go to the jury with any question of fact, but asked the court to hold as a matter of law, that under said Act of Congress, national banks could not be held liable for special deposit; that said Waite could only bind himself, and not the bank, by the contract set forth in said receipt. No other question was raised by defendant.

The court, *pro forma*, declined to hold as requested, but directed a verdict for the plaintiff, to which the defendant excepted, and the case was certified to the Supreme Court.

The opinion of the court was delivered by

WHEELER, J.—Although the plaintiff has in this action declared as for a tort, still, so far as the tort rests upon contract, the same rules are to govern that would if the contract itself had been declared upon; as was said concerning actions of tort founded on the contracts of infants in *Towne et al. v. Wiley*, 23 Vt. 355, and was held respecting the tort of a married woman resting on her contract, in *Woodward & Perkins v. Barnes and Wife*, 46 Vt. 332. The assumption of the obligation that the law imposes upon a depositary to keep the deposit, is, of itself, a contract, as is apparent from the nature of the transaction, and from authority: Jones on Bail. 5; Story on Bail. § 50. In this case there is no evidence of any actual conversion of the plaintiff's bonds to the use of the defendant bank. And in the evidence of some constructive conversion, which the demand and refusal might otherwise afford, what was said in connection with making the refusal is to be taken as a part of it, and altogether that does not show any refusal in denial of the plaintiff's right, but rather a want of power to deliver, and an excuse for it, which would be very doubtful if not insufficient evidence of a conversion, if the demand had been made of the party who had become the depositary: 2 Greenl. Ev., § 644; and would be none whatever of a conversion by the bank, in this case, unless it had itself become the depositary. The transactions by which the plaintiff claims that the bank had become the depositary were wholly with the cashier, and their effect to charge the bank rests entirely upon his power in that direction. There is no

controversy, and could not properly be any, that if the taking of these bonds to keep, as they were taken by the cashier, was within the scope of the corporate business of the bank, then the bank did become the depository of them subject to the liabilities of that relation ; and if without, not.

A bank is an institution for the custody, loaning, exchange or issue of money, and for facilitating the transmission of funds by draft or bills of exchange : Webster's Dict. ; Burrill's Law Dict. ; Bouvier's Law Dict., tit. *Bank*. In *Foster v. Essex Bank*, 17 Mass. 497, the bank was chartered by that name with power to contract by it and without other express powers, leaving the scope of its corporate business almost wholly to implication : but, according to the special verdict in the case, it had always been its practice to receive special deposits of money and other valuable things with the knowledge of and without objection by its directors. An important question in the case, which was debated by as able counsel as any in the country, was as to the power of the president and cashier to bind the bank by taking a large amount of gold coin in kegs to keep, on the taking of which a memorandum of its weight and amount was made, to which the president appended a statement signed by him (but not by his official title), that the coin was weighed in his presence, and the cashier a statement, signed by him as cashier, that it was left at the bank for safe keeping. After much deliberation, it was decided that, on account of that practice, and not because it was a part of legitimate banking business, the bank became charged with the liabilities of a depository of the coin. That case is much relied upon for the plaintiff in this case, and no other case as to the scope of the powers of banks, of sufficient importance to attract the attention of counsel, appears to have arisen and been decided between that and the passage of the Act of Congress, in 1864, under which this bank was organized.

In authorizing the formation of banks under that act, the framers of it must have had in view what the objects of banks were defined to be and what their powers were understood to be ; and, with those things in view, after providing how the banks might be organized and officered, make contracts, sue and defend, enacted that they might exercise under that act "all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt ; by receiving deposits ; by buying and sell-

ing exchange, coin and bullion; by loaning money on personal security; by obtaining, issuing and circulating notes according to the provisions of this act." Deposits in banks had then long been well understood to mean the placing of money in a bank, to the credit of the depositor, to be used by the bank as its own, and be drawn against by, or paid to, the depositor at his pleasure, and not the delivery of either money, securities, or other property, to be specifically kept and re-delivered. These latter had been equally well known as special deposits: *Story on Bail*, § 88; *Foster v. Essex Bank*, 17 Mass. 497. The receiving of such special deposits is not in any sense necessary to carrying on the business of banking. If made of money even, no use could be made of it whatever, nor could any profit be derived from it unless charge should be made for the custody, and then that business would be more like that of a warehouseman than that of a banker. The receiving such general deposits is a part of ordinary banking business, and power to receive them is necessary to carrying on that part and useful to carrying on others; and when Congress granted to the banks the incidental powers necessary to carry on the business of banking by receiving deposits, the kind of deposits that the settled meaning of the term, used in such connection, would apply to, and the kind that would answer the description as to being necessary, must have been intended. The express grant of powers mentioned is, on familiar principles, an implied exclusion of all not mentioned. It has been urged with plausibility, for the plaintiff, that the mention of special deposits in section 46 of the act shows that such were meant to be included among those that the banks, by section 8, are authorized to receive. But the provisions of section 46 are made solely with reference to winding up the affairs of banks after their business has been stopped, and not at all with reference to the prosecution of it; and this part of the section has especial reference to restricting, and not any to enlarging, their powers. And then banks that would have deposits as security for loans might have their business stopped, and, if so, under the provision that they should not prosecute business except to receive and keep their money, they might be embarrassed about such special deposits, on payment of the debts without such a provision as that in section 46 authorizing the delivery of them. But, whatever else may have been the purpose of inserting that clause there, it seems plain that it was not intended to add to powers that had been so categorically

set forth in another separate section as to indicate that all were intended to be named there.

This Act of Congress, besides authorizing the formation of banks, provided a mode for organizing them by the shareholders signing a certificate stating the name, place, and amount of stock of the bank, the number of shares to each stockholder, and a declaration that the certificate was made to enable them to avail themselves of the advantages of that act. In the absence of any showing, it is presumed, from the concession that this is a national bank organized under that act, that it was organized in that mode; and, in organizing in that way, the shareholders would have a right to and would understand that they were engaging in no business except that which the act authorized, and that their officers, chosen by them under that act, would have no authority to enter into any business other than that; to bind them, and to allow the officers to jeopardize their interests, by engaging in other business to the advantage of other persons, would allow the officers to perpetrate a fraud on the shareholders for the benefit of others.

It is insisted for the plaintiff that the cashier by taking the bonds and delivering the written certificate that they were deposited in the bank for safe keeping, bound the bank to keep them safely, and that it has thereby become responsible for them. But, although Lord COKE in his report of *Southcote's Case*, 4 Rep. 83, and in his commentary on Littleton, 1 Inst. 89 a. b., considered that a bailment to keep merely and one to keep safely were of the same obligation, other reports of that case do not seem to warrant his conclusion from it: *Southcote v. Bennett*, Cro. Eliz. 815. And it appears to be now well settled that there is a substantial difference between the two undertakings: *Coggs v. Bernard*, 2 Ld. Raym. 911; Jones on Bail. 48; Story on Bail. § 72. In *Foster v. Essex Bank*, it was expressly decided that neither the cashier nor the president of that bank, even when it had followed the practice of taking special deposits, could bind it by an express promise to keep the coin deposited safely, because such a promise would be outside the practice of taking to keep merely. And clearly, on the authority of that case, the cashier in this case could not bind this bank by an express promise to keep the plaintiff's bonds safely. And the undertaking to keep, implied from the mere acceptance of a deposit, is as far outside the authorized business of this bank as that express undertaking was

outside the practice of that one. This case does not show that the cashier placed these bonds in the vault, or with the property of the bank, at all ; but doubtless the plaintiff expected he would, and he did put them into the vault of the bank. But, if he did, he did not do it as the agent of the shareholders of the bank in their corporate capacity, for he had not been made agent for such a purpose. If he had himself become a depositary and put them there because he considered that to be a safe place for him to keep them in, then the bank is no more liable for them than it would be for bonds of his own if he should put them there for the same reason. If he was the plaintiff's agent in putting them there, they were there at the plaintiff's risk as much as they would have been if the plaintiff had himself, with leave of the person in charge, placed them there. In neither case would the bank be any more liable than a merchant would be if the plaintiff should get his clerk to lock bonds of the plaintiff in his safe ; or than a town would be if he should get the town clerk to lock his bonds into the safe used to keep the town records in. The cashier had no authority to bind the bank by any contract for the custody of the bonds, and the mere fact, if it was the fact, that they got into the vault of the bank would not charge the bank with their custody. National banks have uses for government bonds, and might in various ways, probably, convert them to their use, and should they do so they would unquestionably be liable for the tort as natural or other artificial persons would ; but as this case now stands no such cause of action appears.

Foster v. Essex Bank is the only one of the cases cited in argument, or that has been observed, that has involved any question enough like the leading one in this case to afford any direct guide for its decision ; and there is this difference between that case and this, that in that case the charter did not proceed to express what powers the bank should have to make contracts and to do business, while in this the act under which this bank is organized does expressly set forth what powers the banks should have, and does not include power to take special deposits among them. This case would have been like that as to powers of the banks if the Act of Congress after authorizing the formation of banks with powers to contract, sue, and be sued, had stopped there, without setting forth anything about the business as to which they might contract. As it is, the case has had to be decided more upon the construction

of the Act of Congress, considered with reference to settled principles that stand about the subject, than upon decided cases. And upon that act so considered it is determined here that the taking such special deposits to keep, merely for the accommodation of the depositor, is not within the authorized business of such banks, and that their cashiers have no power to bind them to any liability on any express contract accompanying or any implied contract arising out of such taking.

And this conclusion cannot work any injustice or hardship to the plaintiff, for he dealt with the cashier because he chose to, not because he was obliged to, and if the cashier in the dealings assumed to have any power he did not have, the plaintiff trusted him in that respect and has his responsibility to rely upon to vindicate the assumption. And if the cashier incurred any liability as for himself, the plaintiff likewise trusted him about that and has the same responsibility of the cashier to look to for it.

Judgment reversed and cause remanded.

We have here a new view upon the question of the responsibility of banks for special deposits. It is here distinctly held, that all such undertakings are entirely *ultra vires* of the corporation, and wholly beyond its capacity or power of undertaking in any form or under any circumstances. This form of presenting the question is certainly not a little startling to our quiet sense of security in what has been clearly and unquestionably recognised as undoubted law in this country ever since the decision in *Foster v. The Essex Bank*, 17 Mass. 479, in 1821, now more than half the time of our national existence. That case has been regarded as entitled to special confidence and respect, both on account of the exceptional ability of the argument of counsel and the opinion of the court. It is, perhaps, one of the ablest of the Massachusetts decisions, at a time when that state made most of the law for New England, and had more weight throughout the country than almost any other court. The question there, too, being distinctly made by the most eminent counsel and argued with

complete exhaustiveness, as this was, thus leaving nothing pertinent unsaid, and nothing to give it force and conclusiveness to be desired; and then solemnly decided by an elaborate opinion from one of the ablest and most learned of the American judges, very naturally gave it, in the minds of the profession throughout the country, almost the binding efficacy of a national statute, if there had been any legislative authority to enact one.

It is this sense of the finality of the decision, in this important case, involving, as it did, nearly fifty thousand dollars in coin, that has led, we think, to its having ever since passed without so much as a doubt being expressed, so far as we have been able to find, in any of the numerous cases, where the question was fundamental to the plaintiffs' claim, many of which are found in the American reports. There are two cases in Pennsylvania where this question might have been raised, and if sustained, would have been fatal to the plaintiffs' claim, in neither of which it seems to have been passed upon by the court, if

indeed it was presented for consideration: *Lancaster Nat. Bank v. Smith*, 62 Penn. St. 47; *Scott v. Nat. Bank of Chester Valley*, 72 Id. 471. In the former of these cases the deposit was delivered by the officers of the bank to one having no authority to receive it, and it was held to be a question for the jury how far the bank officers were guilty of culpable negligence. In the latter case the deposit was abstracted by the teller of the bank; and the court held it not such negligence as would make the bank responsible for the act of the teller, that it had allowed him to retain his place in the bank after its officers were aware that the teller had made one successful speculation in stocks. The same question existed in *Marine Bank of Chicago v. Chandler*, 27 Ill. 525; *Smith v. First National Bank of Westfield*, 99 Mass. 605. Other cases might be referred to, but all, so far as we know, rest solely upon the authority of *Foster v. Essex Bank*, *supra*. And while it seems to us somewhat doubtful how far this unbroken current of decision for more than half a century, will be likely to be affected by anything we could urge against its soundness, we are so entirely convinced that it rests upon no satisfactory basis of principle, that we shall venture a few suggestions in addition to the very able, and to us satisfactory, opinion of the learned judge in the principal case.

It will be noticed that the decision in *Foster v. Essex Bank*, as to the responsibility of the bank for special deposits, was not indispensable to the decision of the case. The other question was conclusive for the bank.

But not relying too much upon this, it is evident, upon the first impression, that no bank of discount and deposit can fairly be said to have any charter for keeping valuables in its vaults for the convenience of others. It might be thought by some that there is a possible distinction between the national banks and the former banks chartered under

the states, inasmuch as it is unquestionably competent for the states to create corporations for receiving special deposits of coins or bonds, or other valuables, for custody merely, either with or without compensation, while it seems certain that Congress possesses no such function under the Constitution. But the two cases just cited from Pennsylvania, and the one from the 99th of Mass. Reports, are all cases of national banks, and no such distinction is suggested, and it seems to us of no great account, whether the authority creating the corporation is defective in power or voluntarily withholds it. The power of Congress in creating banks of discount and deposit is restricted by the Constitution under which the power is derived, to the furnishing of a circulating medium and the convenient use of the same in the transactions of trade and commerce. Congress could not, therefore, by express grant, create a corporation for the mere custody of coin, bonds and other valuables for the convenience or security of the owners, which the states unquestionably might do. But it seems equally clear that the state banks were not intended for any such purpose. It seems to be supposed in the opinion in the principal case that, in the case of the Essex Bank, there was no express provision allowing it to keep deposits of any kind, but that this was left to general implication from the nature of the institution, which would have much the same force as an express provision. We notice, however, in the argument of counsel for the bank, that its charter did contain an express provision for receiving deposits for safe-keeping, and it was allowed to discount, to a certain extent, upon its deposits, and in its annual or stated reports to the state authorities, these deposits were required to be specifically set forth, which could only apply to general deposits, since the bank could exercise no such functions in regard to special deposits,

from all which it is apparent the same argument arises as in the case of the national bank charters, that an express authority being given to receive one class of deposits, all others, *ex vi termini*, are excluded upon the basis of the maxim, *expressio unius est exclusio alterius*. It is not claimed in the opinion of the court, in the Essex Bank case, that the charter of the bank embraced any authority, even by implication, to receive these special deposits. It is placed expressly upon the ground that the bank, by its constant usage and practice in accepting such deposits by its officers, had virtually enlarged its charter, or its business at all events, so as to embrace this. This all seems to us an entire misconception of the law of corporations, and really adopting the law applicable to natural persons in its stead. Much of the argument of the court in the Essex Bank case goes upon this ground, as if there were no difference between the case of a natural person and a corporation in regard to extending its business. The fact is that, so far from the cases being similar or analogous in this respect, they are in direct contrast. A natural person possesses an unlimited power of extension and change in regard to action or business, while a corporation is restricted to the very business defined in its charter, and possesses no power to undertake any other without the express consent of the state and of the corporations. It is this restricted power of corporations which enables them to secure capital by affording the investors a sure guaranty against being exposed to any other hazards than such as are defined in the charter. The subscriptions to the capital stock are not only made upon this express guaranty, but the directors are chosen, and all the officers of the corporation are appointed, under the same express limitation, and all their powers are defined under these express limitations.

It is upon this ground that it has been so often held that any fundamental alteration of the charter of a corporation, by which new responsibilities are assumed, will relieve the subscribers to the stock from payment; and if the shares have been before paid up, will enable the holders to restrain the corporation, by injunction in equity, from applying any of the moneys of the original corporation to the enlarged business, as where a railway company have obtained a modification of their charter to enable them to build or buy steamboats for the extension of the line of travel, and thus rendering it more complete and consequently more productive: *Hartford & N. H. Ry. v. Crosswell*, 5 Hill 383; *Stevens v. Rutland & Burlington Ry.*, 29 Vt. 545, where the question is very exhaustively and learnedly discussed by BENNETT, Chancellor. We have collected the authorities upon this point in 1 Railways 206, *et seq.*, which we cannot otherwise here enumerate than by this reference. The same views are maintained in *Nugent v. The Supervisors*, 19 Wallace 241. This doctrine is established beyond all question by the uniform current of authority.

How, then, it may be asked, if the business of a corporation cannot be fundamentally changed, even by act of the legislature, so long as one shareholder dissents, without the purchase of his shares upon his own terms, comes it about that the mere subordinate officers of such corporations, the cashiers of banks, or the station-masters of railways (for the case would be the same if these special deposits were placed in the safe of a railway company for safe-keeping), should possess the power of committing the responsibility of their corporations to an entirely new and extra-hazardous extension of their legitimate business as defined in their charters? There is nothing in the mere practice of the officers of a corporation which has any tendency

to define or fix the responsibility of the corporation, except it have reference to the proper and legitimate functions of such corporations. Within the proper range of the defined business for which a corporation is created, no doubt, the usage or practice of the moneyed agents and servants of such corporations is of controlling force in defining the powers of such agents or servants in binding the corporations. But beyond that safe, and clearly-defined, and well-known limit, the usage and practice of such agents or servants can have no force whatever in binding the corporation, for the best of all reasons, that it is a matter entirely outside of their proper functions and legitimate authority, as defined in the charter of the corporation, to which all persons are bound to refer in judging of the authority of such agents and servants to bind such corporations.

It should therefore be shown that this matter of receiving special deposits comes fairly within the range of the business of the corporation, in order to give the practice of the officers of the bank in accepting them any force in fixing the responsibility of the corporation. But this, we believe, it will be impossible to maintain with any plausibility. These special deposits are not only outside the proper business of a bank, either of discount or deposit, or both, but there is no fair way in which it can be made accessory to the banking business in any form or degree. Special deposits are mere merchandise, whether they consist of American or foreign coin, national, state or municipal bonds, or silver or gold plate, or any other valuable commodity in small space, such as lace or cashmere shawls. The bank acquires no property in such deposits and no lien upon them, except by special contract, for any indebtedness of the depositor. It cannot, therefore, increase its discounts on their account. They are made in this form often when

consisting of coin, because the depositor is unwilling to trust to the responsibility of the bank alone. He prefers to remain the owner of the coin. There is no reason why these deposits should be made, or should ever have been made, in banks, because of their general business under their charters, but solely on account of their possessing extra means of keeping such deposits safely; and there is no more reason for calling such packages "deposits," than for calling similar packages "deposits," when left with any other warehouseman for safe custody. In former times the banks were the only places where such valuables could be made safe from depredation. Hence the officers of the bank, and some of the shareholders probably and naturally, would avail themselves of the protection of the bank vaults. But it seems to us an entire mistake and misapprehension to treat this as an extension of the business of the bank. It is no business of the bank any way, and so every one must consider it who views it justly. The bank derives no profit from it and acquires no interest in the deposits: *Ex parte Brown*, 3 Deacon 91; *Ex parte Bond*, 1 M. D. & G. 10; and being clearly outside of its proper functions, every one is bound to treat it as a mere indulgence granted by the officers of the bank to its friends, to be accepted by those who use it, wholly at their own risk. There is no reason why such deposits might not now be just as well made in the safe of a railway or manufacturing corporation, and would any one claim that this imposed any responsibility upon such corporations? Surely not.

In *Foster v. The Essex Bank*, the court seem to suppose the cashier may bind the bank in accepting the parcel, but not in giving assurance of its safe-keeping. This seems to us an entire denial of the very ground upon which the court fix any responsibility upon the bank. For, if by the usage of the bank

the business had become extended so as to embrace the keeping of these special deposits, and the cashier was the proper officer to accept such deposits, and thereby bind the bank, he must of necessity have the power to bind the bank by his acts and declarations within the range of this portion of his employment. If he could bind the bank by accepting the deposit, he could equally bind it by the terms of the acceptance, since it comes equally within the range of his employment. To argue the contrary, seems to us in conflict with the entire law of agency upon this point. The agent may always bind the principal within the range of his employment. If this had become the proper business of the bank by usage and practice, then the agent employed by the bank to receive those deposits must, from the very necessity of the case, have authority to fix the terms of the acceptance, whether to keep merely at the risk of the owner, or to keep safely, with or without compensation. We might almost as well argue that the cashier may receive general deposits, but has no power to fix the terms of their acceptance. If both come within the enlarged functions of the bank, then the authority of the cashier will be the same in both.

We are fully aware that the practice of corporations has often been allowed to extend their responsibility, somewhat beyond the precise terms of definition used in their charters. It often becomes almost indispensable to give the range of the business of corporations this extension in order to escape absurdities. It is upon this ground that the courts have felt compelled to hold railways responsible upon contracts for transportation off their immediate lines. But this rule of the extension of the business of a corporation by the acquiescence of the corporators in the officers' doing business in a somewhat wider range than the terms of the charter seemed to have contemplated, must always be very

clearly shown, and must never be allowed to extend to any business of an entirely different character: *Allegheny City v. McClurkan*, 14 Penn. St. 81; *Houldsworth v. Evans*, L. R. 3 Ho. Lds. 263, by Lord CRANWORTH; *British Provident Ins. Co.*; *Ex parte Grady*, 9 Jur. N. S. 631. It is here said, what all good lawyers know, that where there is a defect of capacity in the company to do the act, the power cannot be created by the express agreement of the shareholders, nor can it be presumed from any extent of acquiescence. But where only certain formalities are required to the valid execution of the act, as the consent of a general meeting of the shareholders, that will be presumed from acquiescence. This is unquestionably the settled rule of law upon the subject at the present time.

How, then, can it be argued, with any plausibility, that these banks of discount and deposit have no defect of authority to become warehousemen for the safe custody of valuable parcels? For it is impossible to argue, with plausibility even, as we have before intimated, that this function is any more nearly connected with the appropriate duties of banks than of railways. It is a business entirely distinct from that of either, except that railways keep warehouses for the safe deposit of goods awaiting transportation or delivery. And banks keep vaults for the safe custody of their own coin or bills, or other valuable papers, and also for the safe keeping of their collateral securities, which is the only form in which a bank of discount and deposit can become responsible for the safe keeping of any special deposit—that is, when the deposit is accepted as security. In every other case the deposit is with the officer accepting it, and not with the bank, and his placing it among the securities of the bank is wholly unauthorized so far as the corporation is concerned. It is, too, superadding to the legitimate functions

of the bank, not only a distinct business and one having no proper connection with that of the bank, but one also of a very dangerous character. This business of keeping special deposits has become so extensive and so dangerous to the banks that it has become a distinct occupation in the cities in which large capital is invested, and extensive precautions are taken, altogether inconsistent with the ordinary business of banking, which only shows more clearly the mistake in allowing to attach it to the banks. It seems to us, therefore, that if the courts have been pressed, by the exigencies of one class of business, at an early day, to adopt a rule of law inconsistent with the acknowledged principles, applied to analogous questions, it is time to recede from the position when the demands of that class of business have brought about such changes as no longer to require the protection of the exceptional rule of law. For if anything is clear upon principle, it seems to us this is, if we have made ourselves understood. And we must be allowed to express our gratification that the court, in the principal case, have had the self-reliance to place this question upon what we believe every lawyer will recognise as its true basis, and to disregard a course of decisions obviously in violation of principle, and resting solely upon the *Essex Bank* case, which seems originally to have been decided upon the maxim, *Communis error facit jus*, if any case ever was; and that is not a maxim which has ever received much countenance from the courts so far as its literal import is concerned: ELLENBOROUGH, Ch. J., in *Isherwood v. Oldknow*, 3 M. & S. 396, 397, and cases cited in Broom's Leg. Maxims 104.

The Court of Appeals of New York, in *First National Bank of Lyons v. Ocean National Bank*, reported in the Legal Gazette, 23d April 1875, decide a question very similar to that in the principal case, but place their decision, final-

ly, upon the ground, that if the power of the bank to accept special deposits be conceded, it is clear that the cashier and other general executive officers of the bank have no authority to bind the bank by their acceptance, and upon this point sent the case down for a new trial, reserving the broad question of the capacity of the bank to make any such contract, for consideration when it become necessary to decide it. But the court review the cases and discuss the principles bearing on the latter question in a very thorough manner, and with an obvious tendency to the same conclusion we have attempted to vindicate, so that we can entertain no reasonable doubt that the court will, finally, reach that conclusion. Indeed we can scarcely comprehend how the court could reach the conclusion they did, except upon the ground, that accepting special deposits is not the natural and legitimate business of the national banks, or of any other mere banks of discount and deposit. The court here cite from the opinion of COULTER, J., in *Lloyd v. West Branch Bank*, 15 Penn. St. 172, with apparent approbation, language which seems to us to cover the whole controversy: "It was never designed by the provisions of the statute that the bank should be converted into a kind of pawnbroker shop." The language of Lord SELBORNE, Chancellor, in *Great Eastern Railway v. Turner*, Law Rep. 8 Ch. App. 152, may be regarded as a very brief and comprehensive statement of the law applicable to this question. "The company is a mere abstraction of law. All that it does, all that the law imputes to it, as its act, must be that which can be legally done, within the powers vested in it by law. Consequently an act which is *ultra vires*, and unauthorized, is not an act of the company, in such a sense, as that the consent of the company to that act can be pleaded."

We have not deemed it expedient to

go much into other questions of law, which will arise in this class of cases, where the responsibility of the bank, as bailee, is recognised. They are in the main, not attended with much difficulty, and have been very much discussed in many recent cases. If the bailment is gratuitous, and no special undertaking on the part of the bailee for safe keeping, he can only be held responsible in cases of very obvious negligence such as no careful man would be guilty of in his own affairs of like character. The question of presumption, or burden of proof, upon this, and many other questions connected with the law of bailments, is left by the decisions, in too much uncertainty and conflict to be encountered at the close of a long note. And it is never, or but seldom, a question of much practical importance.

Good lawyers will not generally feel compelled to allow their cases to turn upon the mere refinements of the burden of proof and *prima facie* presumptions, when they possess substantial merits beyond all this. Any bailee who does not warrant the success of his undertaking, like carriers and innkeepers, perhaps, may exonerate himself for not restoring the thing bailed, by showing that it was taken from him by robbery or theft without his fault, and that is to be so regarded when his own goods suffer in the same way at the same time. And even where the bailee can give no account of the loss, or how it happened, he is still exonerated if he took such care as the nature of the bailment required, and the goods have been abstracted without his fault.

I. F. R.

Court of Appeals of Maryland.

BROWN AND OTTO v. WERNER.

A division wall may become a party-wall by agreement, either actual or presumed; and although such wall may have been built exclusively upon the land of one, if it has been used and enjoyed in common by the owners of both houses for a period of twenty years, the law will presume, in the absence of evidence showing that such use and enjoyment was permissive, that the wall is a party-wall. In such cases the law presumes an agreement between the adjacent owners that the wall shall be held and enjoyed as the common property of both.

An action was brought to recover damages for injuries done to the plaintiff's house by the careless and negligent manner in which the house of the defendant, next adjoining, was improved, and for the direct losses consequent upon such injuries, sustained by the plaintiff in his trade and business. The plaintiff's house was injured by the partial falling in of the division wall between the two houses; and this was caused by digging too near the wall for the purpose of deepening the cellar under the defendant's house. No notice was given by the defendant of his intention to deepen the cellar, and evidence was offered to show that the excavation was done in a careless and negligent manner. Evidence was also offered to show that the business of the plaintiff, who kept an ice-cream saloon and made cakes and other articles in that line, was interrupted for several days: *Held*,

That the plaintiff was entitled to recover such damages as would be sufficient to reinstate the wall, and the house in as good condition as they were prior to the injury, and to compensate him for the loss consequent upon the interruption of his business.